



required to determine “(1) by a preponderance of the evidence, a conspiracy existed, (2) the declarant and the defendant were both members of the conspiracy, and (3) the statements were made in the course and in furtherance of the conspiracy.”

*United States v. Urena*, 27 F.3d 1487 (10<sup>th</sup> Cir. 1994) citing *United States v.*

*Johnson*, 911 F.2d 1394, 1403 (10<sup>th</sup> Cir.), *cert. denied*, 498 U.S. 1050 (1991). While the Court may permit the declaration conditionally, subject to connection, a pretrial determination of the issue is the “strongly preferred order of proof in determining the admissibility of an alleged co-conspirator statement. . .” *Urena*, 27 F.3d at 1491; See *United States v. Roberts*, 14 F.3d 502 514 (10<sup>th</sup> Cir. 1993) (holding *James* does not impose an intrinsic rule that a judge hold a hearing outside of jury’s presence before the admission of co-conspirator declarations).

It is particularly important in this case that the Court require the Government prior to trial to prove the scope of the conspiracy, both in terms of the identity of the co-conspirators, as well as the time frame of the conspiracy. The Indictment alleges the conspiracy extended for over ten years through April 6, 2010. The last overt act alleged to have been committed in furtherance of the conspiracy occurred on May 18, 2000. There is no other conduct alleged after that date. The Tenth Circuit has held that a coconspirator statement is made “during the course” of the conspiracy if it is made before “the objectives of the conspiracy have either failed or been achieved.” *United States v. Owens*, 70 F.3d 1118, 1126 (10<sup>th</sup> Cir. 1995). Statements made after a conspiracy has ended do not further the conspiracy and are not admissible against the defendant. *Delli Paoli*, 352 U.S. 232 (1957). A

pretrial determination of when the alleged conspiracy ended will enable the Court to establish the parameters for the admission or exclusion of co-conspirator statements intended to be offered by the Government.

A *James* hearing to identify the co-conspirators and the scope of the alleged conspiracy would be an efficient method of addressing the admissibility of co-conspirator statements, rather than having multiple mini-hearings outside the presence of the jury throughout the trial.

Based on the foregoing, Mr. Koch requests the Court schedule a pretrial hearing to determine the admissibility of any statements of alleged co-conspirators the Government intends to introduce against him.

Respectfully submitted,

s/John D. Russell

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### **CERTIFICATE OF SERVICE**

This is to certify that on the 7th day of May, 2010, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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